SILVER BIRD GROUP BHD & ORS v. DATO' TAN HAN KOOK & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AZIZAH NAWAWI J
[SUIT NO: 22NCC-1219-08-2012]
12 OCTOBER 2015

EVIDENCE: *Witness – Recalling of – Recalling of witnesses for purpose of tendering documents – Decision of Audit Oversight Board ('AOB proceedings') – Whether findings of AOB proceedings were judgments, orders and decrees – Whether falling within ambit of s. 43 of Evidence Act 1950 – Whether findings of AOB proceedings disciplinary in nature – Whether admissible – Whether plaintiffs took necessary steps or due diligence in obtaining documents*

CIVIL PROCEDURE: *Trial – Recall of witness after close of case – Recalling of witnesses for purpose of tendering documents – Discretion of court*

The second and third plaintiffs were wholly-owned subsidiaries of the first plaintiff. The plaintiffs' claim, *inter alia*, was against the eighth defendant ('D8') for negligence in the conduct of statutory audit of the plaintiffs. Mr Lee Kok Wai ('LKW') was the engagement partner of D8 for the audit of financial year ended 31 October 2010 ('FYE 2010'). When the defendants closed their case at trial on 8 April 2015, the court gave directions for the filing of written submissions. Whilst preparing the written submission, the plaintiffs discovered about D8's judicial review application to quash the decision of the Audit Oversight Board ('AOB proceedings') to reprimand LKW in respect of D8's audit of the first plaintiff for FYE 2010 ('the said documents'). The discovery of the said documents necessitated the filing of encl. 324 ('present application') to recall LKW for further cross-examination of the said documents. The plaintiffs submitted that they only discovered the said documents on 18 June 2015 and that D8 had sought to prevent the plaintiffs from discovering the said documents by repeatedly seeking injunctive orders to restrain disclosures of decisions made by the AOB in four judicial review applications with regards to the AOB proceedings. However, it was the submission of the defendants that the present application should be dismissed on the grounds that: (i) the findings of the AOB proceedings were judgments, orders and decrees and fell within the ambit of s. 43 of the Evidence Act 1950 ('EA'), which rendered them inadmissible; (ii) the findings of the AOB proceedings, which were disciplinary in nature, were not admissible; and (iii) the plaintiffs had failed to take all the necessary steps or due diligence in obtaining the said documents.

Held (allowing application with no order as to costs):

(1) Courts have a wide discretion to recall witnesses after the case is closed where the application is based on unforeseen circumstances which may develop or that there may be inadvertent omissions, subject to issue of surprise or prejudice to the other party. As such, it depends on the factual matrix of each case as to where the justice of the case lies. (para 16)

(2) The plaintiffs only knew about these documents recently and have since made the present application immediately. An application, filed after the close of the defendant's case, is more likely to be granted (*Tan Kah Khiam v. Liew Chin Chuan & Anor*). At the same time, D8 could not claim to be prejudiced with the present application as they have full knowledge and full access to the said documents. As such, the plaintiffs should be allowed to recall LKW for further cross-examination to tender the said documents. (para 19)

(3) Whether there was due diligence on the part of the plaintiffs to procure such documents is not relevant. In any event, the plaintiffs were not involved in the AOB proceedings, and they could not be said to have knowledge of the same. Since the said documents, that is the findings and/or investigations of the AOB, were with regard to the auditing of the plaintiffs' accounts for FYE 2010, the same was relevant to the plaintiffs' claim against the D8 for negligence. (paras 22 & 23)

(4) Judgments, orders and decrees are limited to orders that are made by the courts only, and not to any orders/decisions made by any other statutory bodies. Therefore, the findings of the AOB proceedings did not fall within the meaning of judgments, orders and decrees in s. 43 of the EA as the AOB proceedings were not court proceedings. Where s. 43 of the EA specifically refers to judgments, orders and decrees, it is statutorily not permissible to extend the same and include the common law position on inadmissibility of evidence of prior disciplinary proceedings, in subsequent civil proceedings. (paras 26, 28 & 34)

(5) The conduct of D8 in filing several injunctive orders in the several judicial review applications to restrain the disclosure of any decisions arising out of the AOB investigation showed that D8 was vigorously taking all legal steps to prevent any disclosure of such documents. Therefore, from such acts of D8, they could not now say that with due diligence, the plaintiff should have known the disciplinary investigation conducted on D8. (paras 37 & 38)

(6) The said documents were relevant and admissible. To exclude such relevant documents on the basis that multiple challenges were being made to nullify the AOB findings was prejudicial to the plaintiffs. It was

highly speculative for D8 to submit at this stage that the said documents would influence the court in deciding the issue of negligence. It was the duty of the court to look at the totality of the evidence presented by all parties. (para 41)

Case(s) referred to:
Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 SC ***(refd)***
Conlon v. Simms [2008] 1 WLR 484 ***(refd)***
Dato' Seri Anwar Ibrahim v. Tun Dr Mahathir Mohamad [2011] 1 CLJ 1 FC ***(refd)***
Hollington v. F Hewthorn & Co Ltd [1943] 1 KB 587 ***(not foll)***
Ladd v. Marshall [1954] 3 All ER 745 ***(refd)***
Lee Kok Wai & Anor v. Securities Commission Malaysia [2015] 4 CLJ 260 HC ***(refd)***
Ong Yoke Eng & Anor v. Lim Ah Yew [1981] 1 LNS 162 ***(refd)***
Tan Kah Khiam v. Liew Chin Chuan & Anor [2006] 4 CLJ 715 CA ***(foll)***
Weng Neng Medical & Liquor (KL) Sdn Bhd v. Fountain Industries Sdn Bhd [1994] 3 CLJ 262 HC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 3
Evidence Act 1950, ss. 43, 138(4)

Evidence Act (Cap 97) [Sing], s. 45A

For the plaintiffs - Alvin Tang (CL Tan, Sharmini G & Lau with him); M/s Ranjit Ooi & Robert Low
For the 1st defendant - William Leong (Abd Halim with him); M/s William Leong & Co
For the 8th defendant - Vernon Samuel; M/s Shui Tai

Reported by Sandra Gabriel

JUDGMENT

Azizah Nawawi J:

The Application

[1] Enclosure 324 is an application filed by the plaintiffs to recall Mr Lee Kok Wai (D8-DW2) ('LKW') for further cross-examination and to tender the following documents:

(i) the eighth defendant's judicial review application dated 14 April 2015 to quash the decision of the Audit Oversight Board ('AOB') on 16 January 2015 to reprimand LKW in respect of the eighth defendant's audit of the first plaintiff for the financial year ended 31 October 2010 ('FYE 2010');

(ii) the notice to show cause dated 5 September 2014 issued by AOB to LKW;

(iii) the letter dated 30 January 2013 issued by AOB to the eighth defendant enclosing a copy of the report on Special Inspection of Crowe Horwath dated 30 January 2013 issued by AOB; and

(iv) the notification of inquiry dated 8 February 2013 issued by AOB to LKW. ('the said documents')

[2] The grounds of the application are as follows:

(i) that the said documents are relevant to the issues in this case, especially on the issue of negligence;

(ii) that it is in the interest of justice that this application is allowed;

(iii) that the eighth defendant would suffer no prejudice as both the eighth defendant and/or LKW are privy to the said documents; and

(iv) that the plaintiffs were not aware of the investigations conducted by AOB and that the plaintiffs only knew about the AOB proceedings after discovering the case of *Lee Kok Wai & Anor v. Securities Commission Malaysia* [2015] 4 CLJ 260.

The Salient Facts

[3] The first plaintiff is a public listed, investment holding company trading on the main board of Bursa Securities Malaysia. The second plaintiff is a private limited company in the business of sale and distribution of bakery goods and telecommunication products. The third plaintiff is a private limited company which deals with manufacturing of frozen and fresh bakery goods. The second and third plaintiffs are wholly-owned subsidiaries of the first plaintiff. The plaintiffs, the 'Silver Bird Companies' share a common management team which supervises and manage the day to day operations of all the subsidiary companies of the first plaintiff.

[4] The plaintiffs' claim against the first, second and third defendants, who were formerly high ranking officers of the plaintiffs, are premised on fraud and breaches of fiduciary duties, in that they had abused their positions of trust within the Silver Bird Companies to misappropriate and/or siphon out funds of approximately RM125 million.

[5] The plaintiffs' claim against the fourth, fifth, sixth and seventh defendants is for fraud, based on a 'series of elaborate and complex surreptitious schemes' crafted and engineered by the first to third defendants with the assistance of the fourth to seventh defendants.

[6] The plaintiffs' claim against the eighth defendant, the external auditor and the ninth and tenth defendants, the internal auditors, are for negligence in the conduct of their statutory audit of the plaintiffs. LKW was the engagement partner of the eighth defendant for the audit of FYE 2010.

[7] The trial, which commenced in 2013 continued in 2014 and was only concluded on 8 April 2015 when the defendants closed their case. The court then gave directions for the filing of the written submissions.

[8] The plaintiffs stated that whilst preparing the written submission, the plaintiffs had discovered the said documents on 18 June 2015. The discovery of the said documents necessitated the filing of the present application.

[9] The AOB is part of the Securities Commission ('SC') and was established by the Securities Commission Act 1993 ('SC Act 1993') and its functions include regulating the auditors of public interest companies, licensed banking institutions and licensed insurance companies. Under the SC Act 1993, the AOB is entrusted to conduct an inquiry in order to ascertain if any person under its supervision has contravened or failed to comply with the provisions of the AOB, other conditions specified by the Act or any guidelines issued by the SC.

[10] The AOB has conducted an inquiry into the conduct of LKW with regards to the auditing of the plaintiffs' accounts for financial year ending ('FYE') 2010. The said documents which the plaintiffs sought to be admitted through the recall of LKW in this application pertained to the AOB inquiry and/or investigation.

[11] This application was objected to by the first and the eighth defendants.

The Findings Of The Court

[12] Section 138(4) of the Evidence Act 1950, which gives the court discretion to recall a witness reads as follows:

> (4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.

[13] With regards to the issue of discretion in recalling a witness, in *Ong Yoke Eng & Anor v. Lim Ah Yew* [1981] 1 LNS 162; [1982] 1 MLJ 226, the court held as follows:

> In civil proceedings, it is in the discretion of the court of first instance to recall a witness or call further witness after his case is closed. Although under ordinary circumstances it may not be necessary or permissible to allow a witness once examined and dismissed by a party to be recalled for it is expected that the advocate will interrogate him on all material points touching his case, unforeseen circumstances may develop and there may be also inadvertent omissions. In such a case, the court may at its discretion allow a witness to be recalled, but surprise or prejudice to the other party should be guarded against ...

[14] The decision in *Ong Yoke Eng (supra)* was cited with approval by the Court of Appeal in *Tan Kah Khiam v. Liew Chin Chuan & Anor* [2006] 4 CLJ 715; [2007] 2 MLJ 445, where the court held as follows:

> [7] In contradistinction to the decision in *Yah bte Aji*, Arulanandom J in *Ong Yoke Eng & Another v. Lin Ah Yew* [1982] 1 MLJ 226 held (so far as is material to the present instance) that:

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> In civil proceedings, it is in the discretion of the court of first instance to recall a witness or call further witnesses after his case is closed. Although under ordinary circumstances it may not be necessary or permissible ... unforeseen circumstances may develop and there may be also inadvertent omissions

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> [8] In my judgment, the better view is that expressed in *Ong Yoke Eng*. A trial judge must be given a wide discretion on matters relating to evidence. After all, the Evidence Act 1950 itself places the matter of relevance and therefore admissibility upon the court.

[15] At p. 724 (CLJ); p. 452 (MLJ), the Court of Appeal also held that:

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> [6] ... whether the trial judge may exercise his discretion to permit re-opening of a party's case will very much depend on the stage at which the application is made. *It may be more likely that discretion may be exercised at the stage where the application is made immediately after a party closes its case. But it may be less likely that discretion will be favourably exercised where the application is made after the defendants have closed their case and just before the*

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> *trial judge is about to pronounce his judgment*. In the spectrum of factual possibilities that exist between each of these two extremes the exercise of discretion would, in my judgment, very much depend as to where the justice of the case lies having regard to the peculiar facts and circumstances before the court. (emphasis added)

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[16] From the cases above, the courts have a wide discretion to recall witnesses after the case is closed, where the application is based on unforeseen circumstances which may develop or that there may be inadvertent omissions, subject to issue of surprise or prejudice to the other party. As such, it depends on the factual matrix of each case as to where the

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justice of the case lies.

[17] In the present case, the plaintiffs submit that they have only discovered the documents on 18 June 2015 and that the eighth defendant has sought to suppress evidence by taking active steps to prevent the plaintiffs from discovering the AOB documents by repeatedly seeking injunctive

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orders to restrain disclosures of decisions made by the AOB in the four judicial review applications with regards to the AOB proceedings.

[18] It is not in dispute that that the eighth defendant has filed four judicial review applications arising out of the AOB proceedings. The multiple applications filed receive adverse comments as can be seen from the decision

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of Justice Asmabi Mohamad in *Lee Kok Wai & Anor v. Securities Commission Malaysia* [2015] 4 CLJ 260 where Her Ladyship held that:

> In pursuing the current application there was clearly an abuse of the process of court as the applicants had already sought a stay of the notification/publication and/or enforcement of the decision made by

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> AOB *vide* the second application ...
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> Therefore, the issues, which were raised by the applicants in the current application, were similar to the issues, which had been ventilated and adjudicated by the court of competent jurisdiction.

[19] As such, I accept the plaintiffs' contention that they only knew about these documents only recently and have since made this application immediately. This application was also filed after the close of the defendants' case, where the Court of Appeal in *Tan Kah Khiam (supra)* held that the discretion is more likely to be granted at this stage. At the same time, the eighth defendant cannot claim to be prejudiced with this application as they have full knowledge and full access to the said documents. As such, I am of the considered opinion that the plaintiffs should be allowed to recall LKW for further cross-examination to tender the said documents.

[20] However, it is the submission of the first defendant that this application should be dismissed as the plaintiffs have failed to comply with the requirements of *Ladd v. Marshall* [1954] 3 All ER 745 with regards to the admission of fresh evidence. The first defendant submits that the plaintiffs have failed to take all the necessary steps or due diligence in obtaining the said documents.

[21] This issue of whether *Ladd v. Marshall* is applicable in an application to recall a witness was also considered by the Court of Appeal in *Tan Kah Khiam (supra)* where the court held that:

> [6] With respect, I am unable to accept the reasoning of the learned judge in the foregoing passage. In my judgment, the criteria for permitting a party at a trial to reopen its case for the purpose of either recalling a witness or calling fresh evidence are very different from those that govern the statutory jurisdiction of the appellate court to receive further evidence. Indeed they cannot be the same as I shall try to demonstrate. In the first place, although an appeal is, as observed by the learned judge in *Yah bte Aji*, by way of rehearing, there are important constraints on an appellate court (see *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 2 MLJ 41 at p 42. Such constraints include the deference given by an appellate court to the audio-visual advantage enjoyed by the trial court. These constraints are absent at a trial. The trier of fact is yet to see and hear the witness whose evidence it is sought to be adduced by a re-opening of the case. In the second place, the issue on an application to adduce further evidence before an appellate court is whether the party seeking to adduce it could not by reasonable diligence have obtained it for use at the trial. This does not enter at all into the equation before the trial court. In the third place, an application to adduce further evidence before an appellate court is temporally fixed. That is to say, it is fixed at the point when all the evidence is in and the submissions are over and more importantly, the trial judge has pronounced his views on the evidence before him. What an applicant for further evidence at the appellate stage seeks to do is to persuade the court hearing the appeal that if the trial judge had the further evidence before him, he may, or even would, have come to a different conclusion. But that is not the position at the trial. For temporally speaking, whether the trial judge may exercise his discretion to permit the re-opening of a party's case will very much depend on the stage at which the application is made ...

[22] Premised on the decision of the Court of Appeal in *Tan Kah Khiam (supra)*, I am of the considered opinion that whether there was due diligence on the part of the plaintiffs to procure such documents is not relevant. In any event, since the plaintiffs are not involved in the AOB proceedings, they cannot be said to have knowledge of the same.

[23] The next issue is whether the said documents are relevant. The plaintiffs' suit against the eighth defendant is for negligence in the conduct of their statutory audit of the plaintiffs, including FYE 2010. LKW was the engagement partner of the eighth defendant for the audit of FYE 2010. It is also not in dispute that that the AOB investigation is on the issue of non-compliance with recognised auditing standards and includes deficiencies in the audit procedures performed by the eighth defendant in the audit of the plaintiffs for the FYE 2010. Therefore, since the said documents, that is the findings and/or investigations of the AOB are with regard to the auditing of the plaintiffs' accounts of the plaintiffs for FYE 2010, the same is relevant to the plaintiffs' claim against the eighth defendant for negligence in its auditing of the same accounts.

[24] However, it is the main contention of the eighth defendant that the said documents are inadmissible. The eighth defendant submits that pursuant to s. 43 of the Evidence Act 1950, the said documents, in particular the findings of the AOB proceedings are inadmissible. Section 43 reads as follows:

> Judgments, orders and decrees other than those mentioned in sections 40, 41 and 42 are irrelevant unless the existence of such judgment, order or decree is a fact in issue or is relevant under some other provision of this Act.

[25] The issue here is whether the findings of the AOB proceedings are 'judgments, orders and decrees' and falls within the ambit of s. 43 of the Evidence Act 1950, which renders them inadmissible.

[26] However, cases have held that 'judgments, orders and decrees' are limited to orders that are made by the courts only, and not to any orders/decisions made by any other statutory bodies. In *Dato' Seri Anwar Ibrahim v. Tun Dr Mahathir Mohamad* [2011] 1 CLJ 1; [2011] 1 MLJ 145, the Federal Court applied the *Law Lexicon's* definition of 'judgment' in the following term:

> **Judgment means a statement given by the judge on the grounds of a decree or order**. [CPC(5 of 1980), s. 2(9)]. **The sentence of the law, or decision pronounced by the Court, upon the matter contained in the record**. (3 Comm. 395, c. 24 Tomlin). A judgment is the final determination of the rights of parties in an action.
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> **A judgment is a sentence of the law pronounced by the Court** upon the matter contained in the record ...
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> In a proper use of terms the only **judgment given by a Court is the order it makes** ... (emphasis added)

[27] In *Weng Neng Medical & Liquor (KL) Sdn Bhd v. Fountain Industries Sdn Bhd* [1994] 3 CLJ 262, the court dealt with the word 'decree' at p. 264:

> A 'decree' is defined in the *Dictionary of English Law*, Vol. 1 1959 as:
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> > An order of the Court pronounced on hearing of a suit, and mainly used in matrimonial suits.
>
> ... For all intent and purpose it amounts to a final order of a Court in a suit' as defined in *Stroud's Judicial Dictionary*, 5th Edn, 1986

[28] From the above cases, it is clear that the findings of the AOB proceedings do not fall within the meaning of 'judgments, orders and decrees' in s. 43 of the Evidence Act 1950 as the AOB proceedings are not court proceedings.

[29] However, learned counsel for the eighth defendant went further and relied on the common law position in the case of *Hollington v. F Hewthorn & Co Ltd* [1943] 1 KB 587. It is the submission of the eighth defendant that s. 43 is a statutory embodiment of the common law principle in *Hollington*'s case.

[30] The principle in *Hollington (supra)* is that a criminal conviction in a criminal court is inadmissible in a civil case. It is the submission of the eighth defendant that the principle in *Hollington* is still applicable in Malaysia because we do not enact similar provision as enacted by the Singapore Parliament in the new s. 45A to the Singapore Evidence Act, which curtails the application of the *Hollington* principle and permit the admissibility of the fact of criminal conviction or acquittal subject to certain conditions. However, even if we apply the common law position in *Hollington v. F. Hewthorne*, the said documents are still admissible because they do not relate to any prior criminal convictions.

[31] The eighth defendant submitted further that the principle in *Hollington*, which initially apply to criminal convictions, have been extended to include disciplinary proceedings. The eighth defendant relied on the case of *Conlon v. Simms* [2008] 1 WLR 484 where the English Court of Appeal held that *Hollinton v. Hewthorn* also applied to decisions in relations to prior disciplinary proceedings, in that the evidence of prior disciplinary proceedings is inadmissible in subsequent civil proceedings. Therefore, it is the submission of the eighth defendant that the findings of the AOB proceedings, which are disciplinary in nature, are not admissible.

[32] However, I am of the considered opinion that the extended position in common law, as decided in *Conlon v. Simms* that *Hollington v. F Hewthorn* also applied to decisions in relations to prior disciplinary proceedings, in that the evidence of prior disciplinary proceedings is inadmissible in subsequent civil proceedings, is not applicable in Malaysia.

[33] This is premised on s. 3 of the Civil Law Act 1956 which was applied by the Supreme Court in *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57. In this case, it was submitted before the Supreme Court to consider the issue of illegality under common law. The court held at p. 66:

> ... That was the position in common law. But the Courts are bound by the statutory provisions in our Contracts Act.
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> ...
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> Section 3 of the Civil Law Act 1956 directs **the Court to apply the common law of England only** in so far as the circumstances permit and save **where no provision has been made by the statute law**. The development of the common law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the Courts in this country. We cannot just accept the development of the common law in England. (emphasis added)

[34] In the present case, we already have s. 43 of the Evidence Act 1950. Therefore, where s. 43 of the Evidence Act 1950 specifically refer to 'judgments, orders and decrees', it is statutorily not permissible to extend the same and include the common law position on inadmissibility of evidence of prior disciplinary proceedings, in subsequent civil proceedings.

[35] It is also the submission of the eighth defendant that this application filed by the plaintiffs is oppressive as the plaintiffs knew of the disciplinary proceedings from the very early stages. This is based on an email dated 10 June 2013 from the eighth defendant's solicitors to inform that the eighth defendant's files were 'held in SC's custody' and were 'seized by the SC'.

[36] However, I do not agree with the eighth defendant's contention that just because the files of the eighth defendant were "seized by the SC", it means that there was a clear reference of investigation towards disciplinary actions. Unless the eighth defendant disclosed such proceedings themselves, others cannot simply presume that there was an investigation conducted which subsequently led to the disciplinary proceedings.

[37] In any event, the conduct of the eighth defendant in filing several injunctive orders in the several judicial review applications to restrain the disclosure of any decisions arising out of the AOB investigation shows that the eighth defendant is vigorously taking all legal steps to prevent any disclosure of such documents.

[38] Therefore, from such acts of the eighth defendant, they cannot now say that with due diligence, the plaintiffs should have known the disciplinary investigation conducted by the SC on the eighth defendant. The eighth defendant cannot now say that the plaintiffs' solicitors should have queried them at the SC in 2013 when parties were at the SC to inspect their respective documents seized by the SC.

[39] In any event, as decided by the Court of Appeal in *Tan Kah Khiam*'s case, the principle in *Ladd v. Marshall* that the plaintiff failed to show that the said documents could not have been obtained with due diligence is not applicable in this case as the trial is yet to be concluded. Therefore, I am of the considered opinion that eighth defendant's allegation that this application is oppressive is clearly misconceived.

[40] The eighth defendant also submit that the AOB findings are not conclusive as the same is subject to an appeal to the SC, subject to the fourth judicial review proceedings that the eighth defendant has initiated to quash the AOB findings as well as the suit MTKL 22NCVC-53-01-2015 which the eighth defendant has filed against the SC, seeking protection under the Whistleblower Protection Act 2010 and seeking to declare the AOB investigations and/or findings as invalid, null and void.

[41] In view of my findings above that the said documents are relevant and admissible, it is up to the parties to submit on the weight to be attached to such documents, to be analysed together with all the rest of the evidence. To exclude such relevant documents now on the basis that multiple challenges are being made to nullify the AOB findings is prejudicial to the plaintiffs, because currently, the fact is that the AOB have made a finding as required under the relevant laws. It is highly speculative for the eighth defendant to submit at this stage that the said documents will influence this court in deciding the issue of negligence. It is the duty of this court to look at the totality of the evidence that has been presented by all parties.

[42] Premised on the reasons enumerated above, the application is allowed with no order as to costs.